

DRAFT, INTERNAL, DELIBERATIVE

Common Control Request
re: Coyote Station & Coyote Creek Mining Co.
from North Dakota Department of Health

Overview of facts:

- Coyote Station coal-fired power plant, operated by Otter Tail. Lignite supplied exclusively by Coyote Creek Mining Co. (CCMC), with mine located 3-4 miles away and coal crushing station located near power plant fenceline.
- The current permit action is a renewal of the Coyote Station title V permit. CCMC does not have title V permit (minor source permit issued 2016). ND made source determination in 2013: separate sources.
- Only regulated air pollutant from CCMC is fugitive PM; only applicable requirements are fugitive dust control plan and NSPS subpart Y requirements on PM from coal crushing.

Ex. 5 Deliberative Process (DP)

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- Ex. 5 Deliberative Process (DP) ND already made a source determination in 2013 (separate sources).

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- Ex. 5 Deliberative Process (DP) ND only requests EPA input regarding the “control” or “common control” prong.

Ex. 5 Deliberative Process (DP)

- Ex. 5 Deliberative Process (DP) ND “requests EPA’s position as to whether the CCMC mine and the Coyote Station” are to be considered under “common control” for air quality permitting purposes.”

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Preliminary OAQPS Staff Analysis:

Ex. 5 Deliberative Process (DP)

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- **Ex. 5 Deliberative Process (DP)** Referencing CCMC's fugitive dust plan requirements, ND states in its October 2, 2018 letter that "it is apparent to the Department that the CCMC mine and the Coyote Station are not under 'common control' as the owners of the Coyote Station do not have authority to dictate decisions that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements for the CCMC mine."

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- **Ex. 5 Deliberative Process (DP)**
 - The commenters assert that "Coyote Station exert[s] complete contractual control over all major decisions at CCMC" because of its authority to approve and amend CCMC's mine plans and capital expenditures.
 - **Ex. 5 Deliberative Process (DP)** "[t]he provisions of these plans do not include any decisions with respect to permitting or environmental compliance" and assert that Coyote Station cannot "affect[] the applicability of air pollution regulatory requirements to CCMC or its compliance with them." Otter Tail comments at 5; CCMC Comments at 4.
- **Ex. 5 Deliberative Process (DP)**
 - **Ex. 5 Deliberative Process (DP)** "exerts actual physical operational control over" coal processing because Coyote Station regularly communicates its coal needs to the CCMC coal processing operator and because Coyote Station starts and stops the conveyor belt bringing coal from CCMC's processing operations to the Coyote Station.
 - **Ex. 5 Deliberative Process (DP)** "does not affect CCMC's responsibility or ability to achieve environmental compliance for its own operations." CCMC Comments at 5–6.

Commented [SM4]: Ex. 5 Deliberative Process (DP)
Ex. 5 Deliberative Process (DP) the CCMC mine is subject to a fugitive dust control plan and it is the sole responsibility of CCMC to demonstrate compliance with the plan.

Ex. 5 Deliberative Process (DP)

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Commented [SM7]: Ex. 5 Deliberative Process (DP)
Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) At most, the required Annual Mining Plan provisions on 'planned mine progression, location of infrastructure, and capital project locations' might be construed as decisions on 'the construction or modification of equipment that will result in emissions.' Otter Tail Comments at 5 (quoting Meadowbrook Letter at 9). Ex. 5 Deliberative Process (DP) the LSA does not provide for any review of how the Mine will meet its environmental obligations for those projects. See LSA ¶ 5.2.2(b)(i). Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Commented [SM8]: Note that when Coyote Station stops the conveyor, the coal crusher automatically shuts off. See Lounsberry deposition at p.25. Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

APPENDIX: Excerpts from relevant documents

Ex. 5 Deliberative Process (DP)

- “Coyote Station exerts complete operational control over Coyote Creek Mine.” At 4.
- Ex. 5 Deliberative Process (DP) “Coyote Station has the absolute right under this contract to disapprove CCMC’s mine plans and to require CCMC to change its mine plans.” At 5.
- Ex. 5 Deliberative Process (DP)
- Ex. 5 Deliberative Process (DP) “A review of the actual contract shows that Coyote Station possesses significant control over CCMC because Coyote Station must approve all activities at CCMC.” At 5.
- Ex. 5 Deliberative Process (DP) “also exerts actual physical operational control over this facility” Ex. 5 Deliberative Process (DP)
- Ex. 5 Deliberative Process (DP) the Coyote Station starts and stops the conveyor belt. At 5.
- Ex. 5 Deliberative Process (DP) “Thus, not only does Coyote Station exert complete contractual control over all major decisions at CCMC, but it also closely coordinates activities between the Station and the coal processing facility by radio and directly controls the conveyor belt that reaches into the coal processing plant from the Station. Coyote Station and CCMC are therefore both under Coyote Station’s common control.” At 5.

Ex. 5 Deliberative Process (DP)

- Ex. 5 Deliberative Process (DP)
 - October 2, 2018 conclusion statement quoted above
 - In its April 11, 2013 source determination, ND stated “there is no common ownership,” that “neither entity has decision-making authority over the other,” and that “[n]either entity . . . is able to direct the management and policies of the other.” ND concluded that “the CCM and the Coyote Station do not appear to be under common control.”
- CCMC general comments:
 - “Coyote Station has no control over decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements at CCM, and CCMC has no control over any decision-making at Coyote Station.” at 1.
 - “Coyote Station does not “control” any of CCMC’s operations—much less its compliance with regulatory requirements concerning air pollution. To the contrary, CCMC has independent and complete responsibility for all actions that “affect the applicability of and compliance with permitting requirements” at its facility.” At 4.
 - “Only CCMC has the authority to install or operate pollution control equipment and conduct any attendant monitoring, testing, recordkeeping, and reporting obligations related to CCM. Only CCMC has the power to direct the construction or modification of equipment at CCM that will result in emissions of air pollution, as “CCMC owns all of its own equipment, including pollution control equipment” and there “is no overlap between the mine and the power plant” pollution control responsibilities. And only CCMC has the power to direct the manner in which such emission units operate, because Coyote Station has no operational or management control of CCM, or any air pollution control equipment at CCM. is reflected in the reality that CCMC, not Coyote Station, is legally responsible for any violations of law, including violations of environmental law, at CCM.” 4-5
- Other Tail general comments:
 - “Coyote Station and the Mine do not share a common owner.” At 4.

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Ex. 5 Deliberative Process (DP)

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- “Otter Tail does not exercise any authority over the Mine's compliance with its environmental obligations.” At 4.
- “Here, Coyote Station does not control the Mine's environmental obligations or compliance.” At 5.
- “In short, CCMC is solely responsible for obtaining the permits for the Mine and for implementation of and compliance with pollution control requirements. Otter Tail exercises no control over these activities—quite the opposite, the LSA explicitly denies Otter Tail such control. Therefore, the Coyote Station and the Mine are not under common control and do not constitute a single major source under the CAA.” At 6.
- The district court stated: “However, the court’s understanding is that there is no relationship in the corporate structures between the owners of the Coyote Station and the owners of the Mine and the rights of approval that the Coyote Station may have to approve budgets and an overall mining plan may only be for controlling the costs of coal, but *not a grant of control over operation of the Mine.*” At 90 n.21 (emphasis added)

Ex. 5 Deliberative Process (DP)

- In its Oct. 2, 2018 letter, WDNR states that “the CCMC mine is subject to a fugitive dust control plan and it is the sole responsibility of CCMC to demonstrate compliance with the plan.”
- CCMC comments:
 - **Ex. 5 Deliberative Process (DP)**

 Neither of these items affects the applicability of air pollution regulatory requirements to CCMC or its compliance with them.” At 4.
 - “the lignite supply agreement does not give Coyote Station the ability to exercise authority over day-to-day mining operations, and expressly provides that the lignite supply agreement does not constitute a partnership between CCMC and Coyote Station.” 4
 - “And while the lignite supply agreement also gives Coyote Station's owners the right to inspect CCM, the agreement provides that “[s]uch inspection shall not be for any purpose or reserved right of controlling the methods and manner of the performance of the work by [CCMC] under this Agreement, but shall be to assure Buyer that [CCMC] is performing its obligations under this Agreement.” 4
 - “Similarly, the fact that Coyote Station can shut off the conveyor and stop the flow of coal does not affect CCMC's responsibility or ability to achieve environmental compliance for its own operations.” 5-6
- Otter Tail comments:
 - “The LSA provides for some degree of coordination between Otter Tail and CCMC with respect to the Life-of-Mine Plan and Annual Mining Plans. See LSA UU 5.2.1-5.2.3.^

Ex. 5 Deliberative Process (DP)

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- “In fact, the LSA explicitly denies Otter Tail any authority to control CCMC's day-to-day operation of the Mine. While Otter Tail retains the right to access the Mine for periodic inspections, including inspection of "environmental and permitting materials," the LSA specifies that "[s]uch inspection shall not be for any purpose or reserved right of controlling the methods and manner of the performance of the work by [CCMC]" LSA^ 12.3(a)." At 6

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See also LSA Contract at page 13 (5.2.1: contents of life-of-mine plan, buyer's review of plan), 14-15 (5.2.2: contents of annual mine plan; 5.2.3 buyer's review of plan), 15 (5.2.4: buyer's approval of capital expenditures), 26 (12.3 periodic inspections).